IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 30TH NOVEMBER 2006 / 9TH AGRAHAYANA 1928

WP(C).No. 14381 of 2006(K)

Unnumbered suit of IIIrd Addl.Sub court, Kozhikode

PETITIONER:

ANIL KUMAR, S/O. KRISHNAN,
MUNDOTTU VAYAL, KOTTOOLI, KOZHIKODE.

BY ADV. SRI.P.G.RAJAGOPALAN
SMT.T.RESMI DAMODARAN

RESPONDENTS:
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1. SMT. VIJAYALAKSHMI M.V.,
W/O. RAVEENDRAN, MUNDOTTU VAYAL THARAMMAL,
KOTTOOLI, KOZHIKODE.

2. SHRI. REDSON M.V., S/O. RAVEENDRAN,
DO. DO.

BY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: copy of plaint of unnumbered suit filed before sub court, kozhikode dt.17/3/2006

EXT.P2: copy of judgment in unnumbered suit dt.10/4/2006

//True copy//

SHW TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO. 14381 OF 2006

Dated 30th November 2006

JUDGMENT

The interesting question to be decided in this petition filed under Article 227 of Constitution of India is whether a trial court is competent to dismiss a suit, before issuing summons to the defendants?

2. Petitioner is the plaintiff in an unnumbered suit on the file of Additional Sub court, Kozhikode. Suit was filed seeking a decree to enforce statutory charge for Rs.1,80,683.28 with future interest on Rs.1,10,000/- at the rate of 6% per annum by sale of plaint schedule property. Case of petitioner was that respondents/defendants executed an agreement for sale on 2/7/1995 and Rs.1,10,000/- was paid as part of sale consideration and by virtue of the agreement a statutory charge as provided under Section 55(6) (b) of Transfer of Property Act has been created and respondents committed breach of agreement and were not ready and willing to perform their part of the

contract and so petitioner is entitled to realise the advance amount paid by enforcing the statutory charge. Before numbering the suit, under Ext.P2 judgment dated 10/4/2006 learned Sub Judge dismissed the suit holding that the cause of action averred in the suit is barred by limitation and suit is not maintainable either on facts or law. Judgment was pronounced and suit was dismissed at the admission stage. This petition is filed challenging the judgment contending that court below should have issued summons to respondents and should not have dismissed the unnumbered suits by a judgment considering the merits of the case. According to petitioner Ext.P2 judgment is vitiated and is to be set aside and suit is to be remanded back to the trial court for fresh disposal.

3. Though notice was issued to respondents they did not appear either personally or through a lawyer. Learned counsel appearing for petitioner was heard. Learned counsel relied on the decision of the Apex court in **Mayar (H.H) Ltd. And others v. Owners & Parties Vessel M.V.Fortune Express and others (2006 (3) SCC 100)** and argued that trial court is competent only to reject the plaint as provided under Order VII Rule

11 at the admission stage on the grounds shown therein and cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, material facts are required to be stated but not the evidence except where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence and so long as plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. It is therefore argued that Ext.P2 judgment is illegal and is to be set aside.

4. Judgment is defined in Section 2(9) of Code of Civil Procedure (hereinafter referred to as the Code) as means the judgment given by the judge on the grounds of a decree or order. Decree is defined in Section 2(2) means formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section

144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final; Order is defined in Section 2(14) as means the formal expression of any decision of Civil Court which is not a decree. Section 33 of the Code provides that the court after the case has been heard shall pronounce the judgment. Order XX provides the procedure for judgment and decree. Under Rule 1, after the case has been heard the court shall pronounce judgment in open court either at once or as soon thereafter. The judgment contemplated is a judgment as defined under Section 2 (14) after the case has been heard. That could only be after issuance of summons, appearance of defendant, filing of written statement, framing of issues and recording of evidence, if any, and not before even numbering the suit. Therefore, even if the suit is disposed by a purported judgment, the court cannot

pronounce the judgment at a stage before even issuing the summons to the defendants. Even if it is termed a judgment it cannot be a judgment as defined under the Code and there cannot be a decree for that purported judgment.

5. The disposal of a suit before numbering or registering the plaint could only be as provided under Rule 11 of Order VII of the Code. Rule 11 provides for rejection of the plaint if clauses (a) to (f) applies. Clause (a) provides for rejection of the plaint where it does not disclose a cause of action and clause (d) where the suit appears from the statement in the plaint to be barred by any law. Power under Rule 11 can be exercised at any stage before registering the plaint or after registering and issuing summons at any stage before the conclusion of trial.

6. Apex court in **Saleem Bhai v. State of Maharashtra (AIR 2003 SC 759)** analysing the provisions of Order VII Rule 11 held

> "9. A perusal of O.VII, R.11, C.P.C makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The

> trial court can exercise the power under O.VII, R.11, C.P.C at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under Cls. (a) and (d) of R.11 of O.VII, C.P.C, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under O.7, R.11, C.P.C cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High court, however did not advert to these aspects."

It is the provisions of Rule 11 which empowers the

court to reject the plaint at the threshold, if no cause of action is disclosed. This statutory provision is necessarily to be invoked to save a defendant from being unnecessarily harassed. It definitely serves the public cause by ensuring that the litigation where the plaint even if not controverted would not enable the plaintiff to the relief claimed. Plaint would be thrown out and thereby court and defendant saved from meaningless exercise and waste of valuable time and energy. As declared by the Supreme Court in **Azhar Hussain v. Rajiv Gandhi (AIR 1986 SC 1253)** the very purpose of conferment of the power of rejection of plaint is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and concerned litigants are relieved of the psychological burden of the litigation. That power must be exercised at the threshold itself, if the court is satisfied that it is a fit case for the exercise of such power. Apex court in **Arivandandam v. Sathyapal (AIR 1977 SC 2421)** held,

> "If on a meaningful or not formal reading of the plaint, it is manifestly

> vexatious and meritless, in the sense of not disclosing a clear right to sue, the trial court should exercise its power under Rule 11 of Order VII CPC taking care that the ground mentioned therein is fulfilled."

Court must also be cautious that it is not carried away by creating illusions of cause of action by skilful drafting. Apex court in **I.T.C Ltd v. D.R.A.T (AIR 1998 SC 634)** observed this

> "The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Rule 11 of Order VII C.P.C clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint."

In **Mohan Rawale v. Damodar Tatyba (1994 (2) SCC 392)** Apex court held that if some cause of action is disclosed, a pleading cannot be struck out merely

because the case is weak. A pleading cannot be struck out merely because the case is weak and not likely to succeed.

7. What the court has to see is whether the pleading discloses a cause of action and not whether the case set up is likely to succeed. Apex court in **Vijai Pratap Singh v. Dukh Haran Nath Singh & another (AIR 1962 SC 941)** held

> "The court has not to see whether the claim made by the petitioner is likely to succeed; it has merely to satisfy itself that the allegations made in the petition if accepted as true, would entitle petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief, no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action, the court does not enter upon a trial of the issues effecting the merits of the claims made by petitioner.

> It cannot take into consideration the defence which the defendant may raise upon the merits; nor is the court competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown: the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit."

Though the said decision was rendered on analysing clause (a) of Rule 5 of Order XXXIII, the principle applies for rejection of a plaint as provided under clause (c) of Rule 11 of Order VII of the Code also.

8. The powers provided under Rule 11 of Order VII only enables the court to reject the plaint and not to dismiss the suit. If the plaint is rejected under Rule 11 as defined under Section 2(2) of the Code, it shall deemed to be a decree and plaintiff is entitled to file an appeal. Plaintiff is also entitled to file a fresh suit in respect of the same cause of action as Rule 13 of Order VII provides that the rejection of the plaint on any of the grounds mentioned earlier shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

9. The learned Sub Judge instead of rejecting the plaint dismissed the suit. The Sub Judge is not empowered to pronounce a judgment or dismiss the suit at a stage before registering the plaint and issuing summons. The dismissal was without jurisdiction. This court has to exercise the supervisory jurisdiction under Article 227 of Constitution of India to correct the illegal exercise of power, which the trial court did not vest.

10. On going through the plaint it cannot be said that the plaint does not disclose a cause of action. What is to be looked into at the stage of pre-

registering of the plaint, is whether the plaint discloses a cause of action. Court has jurisdiction to reject the plaint where the plaint does not disclose a cause of action or where the relief claimed is under valued and the valuation is not corrected within the time as fixed by the court or where the suit appears from the statement in the plaint to be barred by any law. True, court has an obligation to reject the plaint, if any of the grounds provided under Rule 11 of Order VII of the Code is attracted. So long as the plaint discloses a cause of action, the plaint cannot be rejected for the mere reason that in the opinion of the judge the plaintiff may not succeed. Apex court in **Mayar (H.K) Ltd**'s case (supra) held

> "12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action

and if it does, then the plaint cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint disclose a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the

> plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

The dismissal of the suit was therefore without jurisdiction. It is set aside. Sub Judge, Kozhikode is directed to register the plaint and issue summons to the defendants and dispose the suit in accordance with law.

Writ petition is allowed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.